No. 10-437

In the Supreme Court of the United States

GOODY'S FAMILY CLOTHING, INC., et al.,
Petitioners,

v.

MOUNTAINEER PROPERTY CO. II, LLC, EASTGATE MALL, LLC, and STAFFORD BLUFFTON, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

J. Carole Thompson Hord
Schreeder, Wheeler & Flint, LLP
1100 Peachtree Street, NE
Suite 800
Atlanta, GA 30309
(404) 681-3450
chord@swfllp.com

Attorney for Respondent Stafford Bluffton, LLC

Nicholas W. Whittenburg
Counsel of Record
Miller & Martin PLLC
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402
(423) 756-6600
nwhittenburg@millermartin.com

Attorney for Respondent Eastgate Mall, LLC

Duane D. Werb
Werb & Sullivan
300 Delaware Ave., Suite 1300
P.O. Box 25046
Wilmington, DE 19801
(302) 652-1100
dwerb@werbsullivan.com

Attorney for Respondent Mountaineer Property Co. II, LLC

October 27, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

SUPREME COURT RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 the Respondents make the following disclosures:

1. The Respondents are non-governmental corporate parties.

2. The parent corporations for the Respondents are as follows:

   a. Mountaineer Property Co. II, LLC – Mountaineer Management Co.

   b. Stafford Bluffton, LLC – Stafford Development Company.

   c. Eastgate Mall, LLC – (i) JM Chattanooga, LLC; (ii) Eastgate Town Center, LLC; (iii) Crown Eastgate (Delaware), LLC; and (iv) Select Eastgate, LLC.

3. No public company holds 10% or more of any stock of the Respondents.

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STATEMENT OF THE CASE

Eastgate Mall, LLC ("Eastgate"), Mountaineer Property Co. II, LLC ("Mountaineer") and Stafford Bluffton, LLC ("Stafford") (hereinafter, Eastgate, Mountaineer and Stafford shall be collectively referred to as the "Landlords") entered into leases with Goody's Family Clothing, Inc. or its direct or indirect subsidiaries (collectively "Goody's" or the "Petitioners") pursuant to which Goody's leased from the Landlords non-residential real property located in Tennessee, South Carolina and West Virginia on which Goody's operated retail clothing stores. Pursuant to the leases, the Landlords were to be paid rent in advance on the first day of each month during the term of the leases.

On June 9, 2008 (the "Petition Date"), Goody's filed voluntary petitions for relief under Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). On the Petition Date, Goody's also requested authority from the Bankruptcy Court to retain a liquidating agent to assist Goody's in conducting store-closing sales at certain of its retail locations. The stores located on the properties that Goody's leased from the Landlords were included among the stores at which Goody's sought authority to conduct store-closing sales. The Bankruptcy Court granted the motion and a store closing agent was hired to conduct going out of business sales. Specifically, the Bankruptcy Court authorized Goody's and the store-closing agent to begin selling merchandise on the Landlords' properties.

Goody's continued to occupy and conducted going out of business sales on the Landlords' properties. It is undisputed that the store closing sales were successful. Pursuant to the authority afforded by the Bankruptcy Court and pursuant to an agency agreement by and between Goody's and the store closing agent, Goody's received from the agent per diem rent associated with the use of the Landlords' properties following the Petition Date. In other words, in addition to utilizing the Landlords' properties to liquidate assets, Goody's collected per diem rent from the store closing agent for the postpetition period during which the going out of business sales were being conducted. After concluding the going out of business sales Goody's vacated the Landlords' properties and rejected the leases.

Presumably anticipating the filing of bankruptcy, Goody's failed to pay the Landlords the rent that was due under the leases on June 1, 2008. Although receiving per diem rent from the store closing agent, Goody's also refused to pay the postpetition per diem rent for June 2008 as specifically authorized by the order of the Bankruptcy Court. Accordingly, the Landlords filed motions for allowance of rent in the aggregate amount of $60,860.56 (the "Stub Rent") from June 9 through June 30, 2008 (the "Stub Rent Period") as an administrative expense pursuant to Section 503(b)(1) of the Bankruptcy Code. The Landlords expressly asserted that Goody's continued use of the Landlords' properties following the Petition Date, including occupying the properties to conduct successful store closing sales, entitled the Landlords to receive the Stub Rent as an administrative expense pursuant to Section 503(b)(1).

Goody's objected to the Landlords' motions. During oral arguments before the Bankruptcy Court, Goody's acknowledged that they had used and occupied the Landlords' premises during the Stub Rent Period and that they received benefit from such use and occupancy. Goody's admitted that the store closing sales conducted at the Landlords' premises were successful. Goody's also did not dispute the amount of the Stub Rent. At the conclusion of the hearings, the Bankruptcy Court entered orders allowing the Landlords' claims for Stub Rent as administrative expenses pursuant to Section 503(b)(1) of the Bankruptcy Code. (Pet. App. C53a-82a, D83a-84a and E85a-86a.)

An appeal was taken to the United States District Court for the District of Delaware (the "District Court"). The District Court issued an Opinion and Order dated March 31, 2009 affirming the Bankruptcy Court's decision. (Pet. App. B18a-52a.)

Goody's timely appealed the District Court's Order and Opinion to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). The Third Circuit issued an Opinion dated June 29, 2010, affirming the District Court's decision. (Pet. App. A1a-17a). The Third Circuit's opinion is reported at In re Goody's Family Clothing, Inc., 610 F.3d 812 (3d Cir. 2010).

Pursuant to Supreme Court Rule 10, Goody's filed its Petition for Writ of Certiorari (the "Petition") seeking review of the Third Circuit's Goody's opinion. For the reasons discussed below, the Court should deny the Petition.

SUMMARY OF THE ARGUMENT

The Petitioners erroneously maintain that both the Sixth Circuit Court of Appeals (the "Sixth Circuit") and the Eighth Circuit Court of Appeals (the "Eighth Circuit") have held that Section 365 of the Bankruptcy Code provides the exclusive basis for allowance of a landlord's claim for postpetition rent. To the contrary, none of the cases cited by Goody's in the Petition hold that Section 365(d)(3) supplants Section 503(b)(1). Indeed, no reported decision relied on by the Petitioners involves an administrative claim for stub rent under Section 503(b)(1) of the Bankruptcy Code. No decision cited by Goody's considers the intersection of Section 365(d)(3) and Section 503(b)(1) of the Bankruptcy Code. Reported decisions from both the Sixth and Eighth Circuits as well as lower court decisions are consistent with the Third Circuit's Goody's opinion. There is simply no conflict among the Circuit Courts warranting a review of the Third Circuit's Goody's opinion.

LAW AND ARGUMENT

I. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS.

Goody's relies on an unreported slip opinion from the Sixth Circuit, BK Novi Project, LLC v. Stevenson (In re Baby N' Kids Bedrooms, Inc.), Case No. 07-1606, 2008 U.S. App. Lexis 27720 (6th Cir. Mar. 26, 2008), as being in direct conflict with the Third Circuit's Goody's opinion. In BK Novi the Sixth Circuit affirmed an unreported decision from the United States District

Court for the Eastern District of Michigan denying a landlord's motion seeking an administrative expense claim for postpetition rent.

This Court should not consider an unreported decision from the Sixth Circuit as creating a conflict between the Circuit Courts warranting a review of the Goody's Opinion. Contrary to Goody's position, the Sixth Circuit in BK Novi did not hold that Section 365(d)(3) preempts Section 503(b)(1). The landlord in that case did not assert a right to payment under Section 365(d)(3). The Sixth Circuit merely held that, based on the facts presented, the landlord's claim for rent was not entitled to priority as an administrative expense under Section 503(b)(1). The Sixth Circuit did not hold that claims falling outside the parameters of Section 365(d)(3) may not qualify as administrative expenses pursuant to Section 503(b)(1). In fact, in its unreported slip opinion, the Sixth Circuit did not even consider the intersection of Sections 365(d)(3) and 503(b)(1) of the Bankruptcy Code.

Goody's also erroneously argues that the Third Circuit's Goody's opinion is contrary to the Sixth Circuit's opinion in Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.), 203 F.3d 986 (6th Cir. 2000). Koenig is factually distinguishable from the Goody's opinion. In Koenig, rent for the entire month of December 1997 became due under the terms of a lease on December 1, one day before the effective date of the Debtor's post-bankruptcy rejection of the lease on December 2, 1997. Id. at 988. Based on these facts, the Sixth Circuit held that Section 365(d)(3) of the Bankruptcy Code required payment of the full month's rent even though the debtor had vacated the premises on December 2, 1997.

Id. at 989. The Sixth Circuit relied solely on Section 365(d)(3) of the Bankruptcy Code in reaching its decision.

Koenig dealt with a lease obligation that arose postpetition and prior to the rejection of the lease, an obligation falling squarely within the parameters of Section 365(d)(3). The Goody's opinion deals with the Landlords' administrative claim for the Stub Rent, an obligation falling outside the parameters of Section 365(d)(3). The Sixth Circuit in Koenig did not hold that obligations falling outside the parameters of Section 365(d)(3) may not qualify as administrative expenses under Section 503(b)(1) as suggested by the Petitioners. In Koenig, the Sixth Circuit was not required to consider the intersection of Sections 365(d)(3) and 503(b)(1). By allowing a landlord's claim for post-bankruptcy rent under Section 365(d)(3), the Sixth Circuit's decision in Koenig is not contrary to the Third Circuit's allowance of the Landlords' administrative expense claims for the Stub Rent pursuant to Section 503(b)(1) in the Goody's opinion.

It is important that the Sixth Circuit did not overturn its decision in United Trucking Serv., Inc. v. Trailer Rental Co., Inc. (In re United Trucking Serv., Inc.), 851 F.2d 159 (6th Cir. 1988), in either BK Novi or Koenig. In United Trucking, the Sixth Circuit allowed an equipment lessor's administrative expense claim arising from a debtor's post-bankruptcy use of the lessor's property pursuant to section 503(b)(1) notwithstanding the rejection of the lease pursuant to Section 365 of the Bankruptcy Code. Id. at 162. The Third Circuit's holding and reasoning in the Goody's opinion are entirely consistent with the Sixth Circuit United Trucking decision.

Goody's also incorrectly argues that the Third Circuit's Goody's opinion is in direct conflict with the Eighth Circuit's opinion in Burival v. Roehrich (In re Burival), 613 F.3d 810 (8th Cir. 2010). In Burival, a landlord leased farmland to the debtors prior to the commencement of bankruptcy. Id. at 811. On December 1, 2007, two days after the debtors' filed Chapter 11 bankruptcy, the debtors failed to pay the rent due under the lease and ultimately rejected the lease on March 19, 2008. Id. The landlord sought payment of the full rent arising postpetition and prior to the rejection of the lease under Section 365(d)(3). Id. The Eighth Circuit granted the landlord's request. Id. at 812. In so holding, the Eighth Circuit relied upon the Sixth Circuit's decision in Koenig.

For the reasons noted above respecting Koenig, the Eighth Circuit's Burival decision is distinguishable from and does not conflict with the Third Circuit's Goody's opinion. Burival concerned a landlord's claim for rent that arose under the lease after the commencement of bankruptcy and prior to rejection of such lease, an obligation falling squarely within the parameters of Section 365(d)(3). By allowing the landlord's claim under Section 365(d)(3), the Eighth Circuit was not required to consider the intersection between Sections 365(d)(3) and 503(b)(1). Because the case did not involve a claim for stub rent, the landlord in Burival did not assert a claim under Section 503(b)(1).

In their Petition, Goody's quotes from Burival stating that "[s]ection 365(d)(3) expressly preempts subsection 503(b)(1) . . . ." 613 F.3d at 812. Goody's reliance on this partial quote is misguided. The Eighth Circuit was addressing an argument made by

the debtor that a rent claim governed by Section 365(d)(3) is not entitled to administrative expense status under Section 503(b) of the Bankruptcy Code. With the statement quoted above, the Eighth Circuit, consistent with the Goody's opinion, was merely noting that Section 365(d)(3) removed the procedural and substantive burdens placed on non-residential landlords asserting administrative claims by Section 503(b)(1) respecting obligations falling within the parameters of Section 365(d)(3). Id. The Eighth Circuit did not hold that lease obligations falling outside the parameters of Section 365(d)(3) may never qualify as administrative expenses under Section 503(b)(1).

It is important that in Burival, the Eighth Circuit discussed and did not overturn a prior decision in which the Eighth Circuit allowed administrative expense claims for rent despite the inapplicability of Section 365(d)(3). Id. at 813 (citing Reiter v. Fokkena (In re Wedemiere), 237 F.3d 938 (8th Cir. 2001)). As the Third Circuit did in the Goody's opinion, the Eighth Circuit in Wedemiere allowed landlords' administrative claims for rent equal to the reasonable rental value of the properties used by the debtors post-bankruptcy, notwithstanding the fact that such rent did not "arise" under the leases following the commencement of bankruptcy and, thus, was not payable pursuant to Section 365(d)(3). 237 F.3d at 941-42. The Third Circuit's Goody's opinion, rather than conflicting with the decisions in the Eighth Circuit, is entirely consistent with the Eighth Circuit's Wedemiere decision.

The Petitioners have failed to cite one reported Circuit Court opinion that conflicts with the Third

Circuit's Goody's opinion. All lower courts that have considered the intersection of Sections 365(d)(3) and 503(b)(1) have rejected Goody's contention that Section 365 provides the exclusive statutory basis for the allowance of a landlord's claim for rent. See e.g., In re Rhodes, Inc., 321 B.R. 80, 92 (Bankr. N.D. Ga. 2005) ("It would be a strange result indeed, bordering on the absurd, to hold that in enacting section 365(d)(3) to protect landlords, Congress intended to strip landlords of any right to payment of an administrative expense for use of their premises for the stub rent period and to leave them with only pre-petition, unsecured claims."); In re ZB Co., 302 B.R. 316, 319 (Bankr. D. Del. 2003) ("That proration of rent is not permitted under section 365(d)(3) does not leave the Landlords without a remedy, however. Section 503(b)(1)(A) grants an allowed administrative claim for 'the actual, necessary costs and expenses of preserving the estate . . .' Section 503(b)(1)(A) fills the stub gap created by section 365(d)(3)."); In re BCE West, L.P., 264 B.R. 578, 584 (9th Cir. BAP 2001), aff'd, 319 F.3d 1166 (9th Cir. 2003) (Although holding that section 365(d)(3) was inapplicable, the Bankruptcy Appellate Panel nevertheless observed "that, as a matter of law, it is true that a non-debtor party . . . to an executory contract with the debtor is entitled to an administrative claim equal to the value of any postpetition benefit conferred on the estate before assumption or rejection of that contract."); In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 473 (Bankr. D. Del. 2006) (The bankruptcy court recognized that a lessor of equipment may be allowed an administrative claim for the benefit conferred on the bankruptcy estate pursuant to Section 503(b)(1) even though the claim is not within the parameters of Section 365(d)(5), which, similar to Section 365(d)(3), requires the debtor to

satisfy obligations first arising under personal property leases after sixth days following the commencement of bankruptcy."); In re DVI, Inc., 308 B.R. 703, 707-08 (Bankr. D. Del. 2004) ("A landlord is entitled to an administrative claim in the amount of the fair market value of the premises when a debtor occupies and uses it postpetition."); In re HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) ("A lessor is generally entitled to an administrative claim under section 503(b) for the fair rental value of the lessor's property actually used by the debtor.")

Goody's central premise that Section 365 of the Bankruptcy Code preempts Section 503(b)(1) is inconsistent with the Supreme Court's construction of Section 365 in Nat'l Labor Relations Bd. v. Bildisco and Bildisco, 465 U.S. 513 (1984). In Bildisco the Supreme Court discussed generally the application of Section 365 of the Bankruptcy Code and claims that may be asserted by non-debtor parties to contracts and leases that are rejected in bankruptcy. While observing that claims for damages arising from the rejection of a lease or contract are to receive the priority provided general unsecured creditors, the Supreme Court nevertheless stated that "[i]f the debtor-in-possession elects to continue to receive the benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . which, depending on the circumstances of a particular case, may be what is specified in the contract." Id. at 531 (citations omitted). In the Goody's opinion, the Third Circuit, consistent with the Supreme Court's Bildisco decision, affirmed the allowance of the Landlords' administrative claim for rent equal to the reasonable

value for Goody's continued use of the Landlords' properties following the Petition Date during the Stub Rent Period.

II. THE THIRD CIRCUIT'S GOODY'S OPINION DOES NOT EXPAND A CONFLICT AMONG CIRCUIT COURTS CONCERNING THE PROPER TREATMENT OF RENT.

In their Petition, Goody's refers to a purported split among the Circuit Courts regarding determining when an "obligation", including rent, "arises" under Section 365(d)(3). According to Goody's the Third, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals have adopted the "billing date" or "performance date" approach. (Pet. at 11-12.) Pursuant to this approach, if an obligation arises pursuant to the express terms of the lease after the commencement of bankruptcy but before the rejection or expiration of the lease, 365(d)(3) requires the debtor to satisfy such obligation. See e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 209 (3d Cir. 2001) ("[T]he terms of the lease . . . determine both the nature of the 'obligation' and when it 'arises.'")

Goody's maintains that the Seventh Circuit adopted the "proration" approach to determining when an "obligation" "arises" under Section 365(d)(3) in In re Handy Andy Home Improvement Ctrs., Inc., 144 F.3d 1125, 1127 (7th Cir. 1998). (Pet. at 12.) According to Goody's, under this approach a landlord is entitled to collect rent for every day following the commencement of bankruptcy that the debtor continues to occupy the leased property pursuant to Section 365(d)(3) without

resort to Section 503(b)(1). (Pet. at 13.) Contrary to Goody's contentions, the Seventh Circuit has not adopted the proration approach to determine whether a landlord's claim for postpetition rent falls within the parameters of Section 365(d)(3).

In Handy Andy the Seventh Circuit addressed a landlord's claim for real estate taxes rather than rent. 144 F.3d at 1126. Not surprisingly, the Seventh Circuit held that the portion of the real estate taxes that accrued prepetition was not an "obligation" "arising" after the petition date entitled to payment under Section 365(d)(3). Id. at 1127. In so holding, the Seventh Circuit noted that the lease at issue required that real estate taxes be prorated upon termination of the lease "so that the [debtor] would be responsible only for those taxes that had accrued before termination." Id. at 1126.

Subsequent to the Handy Andy decision, the Seventh Circuit applied the "billing date" approach respecting a landlord's claim for postpetition rent in Ha-Lo Indus., Inc. v. Centerpoint Props. Trust, 342 F.3d 794, 799 (7th Cir. 2003). In Ha-Lo the landlord leased an office building to the debtor. Id. at 796. After the debtor filed bankruptcy, the debtor rejected the lease effective November 2 and vacated the premises on November 4, 2001. Id. at 797. Because the rent for the entire month of November 2001 came due on November 1, the Seventh Circuit held that Section 365(d)(3) required the debtor to pay its November 2001 rent in full. Id. at 799. Distinguishing its earlier Handy Andy decision, the Seventh Circuit applied the "billing date" approach when determining whether the landlord's claim for rent fell within the parameters of Section 365(d)(3). Adopting the billing

date method, the Seventh Circuit discussed and relied on the Sixth Circuit's Koenig decision. Id. at 799-800. Thus, at least regarding postpetition rent claims, the Seventh Circuit's construction of Section 365(d)(3) is consistent with the decisions of other Circuit Courts, including the Third Circuit.

Even assuming the existence of a conflict among the Circuit Courts regarding the construction of Section 365(d)(3), the present case does not present an appropriate vehicle to resolve any such conflict. Upon a review of the Goody's opinion, if this Court were to reject the "billing date" approach and, instead, adopt the "proration" approach, Goody's would nevertheless be required to pay the Landlords' claims for the Stub Rent for the Stub Rent Period pursuant to Section 365(d)(3). This is because it is undisputed that the prorated rent for the Stub Rent Period is equal to the Stub Rent.

On the other hand, should this Court adopt the "billing date" approach consistent with the Third Circuit's Goody's opinion, this Court should also affirm the Goody's opinion and uphold the allowance of the Landlords' Stub Rent claim as administrative expenses pursuant to Section 503(b)(1). As noted previously, the Debtors have referred to no Circuit Court opinion holding that Section 365(d)(3) provides the exclusive means by which a landlord is entitled to postpetition rent. Instead, in jurisdictions adopting the "billing date" approach to defining the parameters of Section 365(d)(3), landlords may resort to Section 503(b)(1) to assert an administrative expense claim to the extent they can satisfy the procedural and substantive burdens imposed by such section. The Goody's opinion simply does not create or expand any purported

conflict concerning the proper treatment of claims for post-bankruptcy rent.

CONCLUSION

For the foregoing reasons, the Landlords submit that this Court should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

Nicholas W. Whittenburg
Counsel of Record
Miller & Martin PLLC
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402
(423) 756-6600
nwhittenburg@millermartin.com

Attorney for Respondent
Eastgate Mall, LLC

and

J. Carole Thompson Hord
Schreeder, Wheeler & Flint, LLP
1100 Peachtree Street, NE
Suite 800
Atlanta, GA 30309
(404) 681-3450
chord@swfllp.com

Attorney for Respondent
Stafford Bluffton, LLC

Duane D. Werb
Werb & Sullivan
300 Delaware Ave., Suite 1300
P.O. Box 25046
Wilmington, DE 19801
(302) 652-1100
dwerb@werbsullivan.com

Attorney for Respondent
Mountaineer Property Co. II, LLC